

Supreme Court, U.S.
FILED
MAY 4 1988
JOSEPH F. SPANIOLO,
CLERK

No. 87-1419

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JOHN PETER CERONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

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May it please the Court:

In presenting its consolidated response to the several petitions seeking review of the proceeding below, the government ignores the issue which may be the most significant of all.

Our Petition (pp. 11-16) argued that the terms conspirator, aider-abettor and principal should not be treated as synonyms. The government responds (Br. 15-16), in essence, that prosecutors are entitled to make a whimsical

election to designate an indictee as either an aider-abettor or a principal, because courts "routinely" permit persons indicted as abettors to be convicted on evidence showing them to be principals, and vice versa.

The thaumaturgical equivalent of that position is levitation. That the government has been permitted by some courts to treat two different concepts as interchangeable does not convert whimsicality into reasonableness.

When the third designation—"conspirator"—is added to the prosecutor's list of convertible accusations, the result is an opaque potpourri none of whose ingredients is identifiable. It is on that basis that the government was enabled to convict Petitioner of conspiracy to conspire to aid and abet the conspiracy.

A conspiracy to conspire to aid and abet the conspiracy is a concept which defies both fundamental logic and the Sixth Amendment. In the context of this case, the government's argument (Br. 15-16) that no harm results unless the indictee can show prejudice amounts to a claim that evidence can be sufficiently voluminous to demonstrate that the indictee is guilty regardless of the nature of the accusation.

* * *

Turning to a related issue, we invite the Court's special scrutiny of the government's attempted distinction between a conspiracy and a substantive offense prosecuted under a *Pinkerton* theory. They are two very different offenses, the government contends, because:

The **Pinkerton offense** is proved by showing an agreement followed by a criminal act.

—While on the other hand—

A **conspiracy** is proved by showing an agreement followed by *any* furthering act. (G. Br. 10).

Otherwise stated, it is the government's position that if a conspiratorial agreement produces a crime, the prosecutor has two choices with respect to vicarious liability: Treat the crime as the overt act, thus charging a single offense; or multiply the charges by treating some otherwise noncriminal furthering act as the second element of the conspiracy while simultaneously prosecuting the substantive crime on a vicarious *Pinkerton* theory.

If that is the law, it is high time that doctrine were removed from American jurisprudence as an unwelcome circumvention of the Fifth Amendment's double jeopardy clause.

Respectfully submitted,

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